such a claim due to unpatentability of another claim. The sole basis for unpatentability resides in the statutes. The statutes do not authorize unpatentability to be implied from other claims of the same application. Nothing in the statutes permits unpatentability of claims to be based on unpatentability being implied from unpatentable other claims. A restriction requirement has nothing to do with patentability or unpatentability.

The Official Action states, " . . . the device or group I invention could be made by processes materially different from those of group II invention. For example, by injecting the microspheres by inert gas/air pressure and then pouring the micropheres with the liquid." First, it is noted Group II is an apparatus claim, not a method claim. Thus, the Examiner's reference to process, is inappropriate. In any event, no prima facie basis for the restriction requirement has been made in the Official Action since there has been no factual basis for identifying a material difference arising from a change in the manufacturing process suggested by the Examiner.

The Examiner also notes:

> "...the apparatus as claimed can be used to practice another and materially different process...In this case using an apparatus having air/inert gas injector to arrange the microspheres instead of using the apparatus having the container for storing liquid with the microspheres."

Again, no prima facie basis for restriction has been made since there has been no factual basis for identifying immaterial difference arising from the change in the apparatus suggested by the Examiner.

In requiring restriction, the Examiner also notes the inventions are classified in different classes and sub-classes, thus alluding to the fact that the inventions would involve divergent fields of search. However, as the Examiner is well aware, such a factor per se is not a basis for determining distinctiveness in accordance with MPEP 806.

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Furthermore, it is respectfully submitted that there is nothing in 35 USC § 121 that gives the Patent Office the authority to require restriction between different statutory classes of claims unless the claims cover "independent and distinct inventions." It is respectfully submitted that the statutory requirements, not having been met here vis-a-vis Groups I and II respectively, the Examiner should withdraw the requirement for restriction and provide Applicant with an action on the merits of the withdrawn claims.

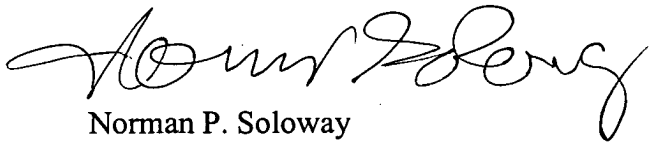
It should be noted that the restriction requirements as prescribed by 35 USC § 121 are discretionary with the Examiner, and in view of the remarks above, the restriction requirement should be withdrawn.

In summary therefore, all of the claims are believed to be directed to a single invention. However, so as to be fully responsive, Applicant provisionally elects to prosecute Group II, i.e. Claims 3-9 and 20-24, and it is requested that, without further action thereon, the remaining claims be retained in this application pending disposition of the application, and for possible filing of a divisional application.

An action on the merits is respectfully requested.

In the event there are any fee deficiencies or additional fees are payable, please charge them (or credit any overpayment) to our Deposit Account No. 08-1391.

Respectfully submitted,



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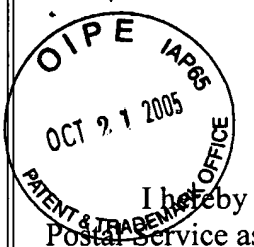

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I hereby certify that this correspondence is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: MAIL STOP AMENDMENT, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on October 17, 2005, at Tucson, Arizona.

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